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TN REGULATORY AUTHORITY
DOCKET ROOM

July 18, 2005

Honorable Ron Jones, Chairman
Tennessee Regulatory Authority
ATTN: Sharla Dillon, Dockets
460 James Robertson Parkway
Nashville, TN 37243-5015

RE: Joint Petition for Arbitration of an Interconnection Agreement with BellSouth
Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act
of 1934, as Amended; Tennessee Regulatory Authority Docket No 04-00046

Dear Chairman Jones:

Enclosed for filing in the above-referenced matter please find the original and thirteen
(13) copies of the Joint Petitioners' Rebuttal to BellSouth's Reply Regarding Removing Certain
Issues From the Joint Petitioners' Section 252 Arbitration Proceeding

Thank you for your assistance. If you have questions, please do not hesitate to contact
me.

Sincerely,



H. LaDon Baltimore

LDB/dcg
Enclosures
cc. Guy Hicks, Esq.

**BEFORE THE
TENNESSEE REGULATORY AUTHORITY**

In the Matter of)	
)	
Joint Petition for Arbitration of NewSouth)	Docket No. 04-00046
Communications Corp., <i>et al.</i> with)	
BellSouth Telecommunications, Inc.)	

**JOINT PETITIONERS' REBUTTAL TO BELL SOUTH'S REPLY REGARDING
REMOVING CERTAIN ISSUES FROM THE JOINT PETITIONERS'
SECTION 252 ARBITRATION PROCEEDING**

NewSouth Communications Corp. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), and Xspedius Communications, LLC on behalf of its operating subsidiaries named in this proceeding ("Xspedius") (collectively, the "Joint Petitioners"), by and through their undersigned counsel, hereby submit this Rebuttal to BellSouth's June 7, 2005 Reply to the Joint Petitioner's Opposition to BellSouth's request to move Issues 26, 36, 37, 38 and 51 ("*TRO*-Related Arbitration Issues") from this arbitration to the Generic Proceeding ("Reply")¹ The Joint Petitioners take this opportunity to rebut certain erroneous arguments made by BellSouth and to reiterate their request that the Tennessee Regulatory Authority ("Authority") sustain and enforce Joint Petitioners' right to have the *TRO*-Related Arbitration Issues timely resolved in their Section 252 arbitration proceeding. BellSouth's request to move the *TRO*-Related Arbitration Issues to the Generic Proceeding is a thinly veiled attempt to (1) further delay compliance with provisions of the *TRO* that are critical to facilities-based competitors, such as

¹ BellSouth improperly made its initial request to move the *TRO*-Related Arbitration Issues in its post-hearing brief filed on April 15, 2005. In its Reply, BellSouth notes that the Joint Petitioners filed a "seven-page Opposition to BellSouth's request, which consisted of a single paragraph" at 2. The Joint Petitioners are unclear as to what BellSouth is referring to. The date-stamped copy of the Opposition the Joint Petitioners filed on May 20, 2005 as well as the corrected version filed on May 25, 2005 ("Joint Petitioners' Opposition") both appear to be seven pages, double spaced, consisting of nine paragraphs.

NuVox and Xspedius, (2) raise Joint Petitioners' costs by forcing them to litigate twice, and (3) give BellSouth another chance to do what it failed to do in this docket (which is to prove why Joint Petitioners' positions should not prevail). In sum, BellSouth's request is highly prejudicial and improper. The Authority should reject BellSouth's request and expeditiously issue an arbitration award in favor of Joint Petitioners on the *TRO*-Related Arbitration Issues as well as all others.

A. The *TRO*-Related Arbitration Issues Already Have Been Briefed and Are Ready for Decision by the Authority

As the Authority is aware, the Joint Petitioners joined BellSouth in a motion to move a single unresolved Supplemental Arbitration Issue related to the *Triennial Review Remand Order* (Issue 23) to the Authority's Generic Proceeding.² As discussed in the Joint Petitioners' Opposition, this particular issue was potentially impacted by the FCC's release of the *Triennial Review Remand Order*.³ Notably, the hearing in Tennessee was conducted **before** the FCC's *Triennial Review Remand Order* had even been released. Thus, there were compelling reasons to defer the *TRRO*-Related Arbitration Issue to the Generic Proceeding for resolution

That situation stands in stark contrast to that of the set of *TRO*-Related Arbitration Issues that BellSouth seeks to move into the Generic Proceeding over the opposition of the Joint Petitioners. Unlike the *TRRO*-Related Arbitration Issue, the *TRO*-Related Arbitration Issues are briefed and fully ready for Authority resolution – nearly a year-and-a-half after these issues were raised in Joint Petitioners' arbitration petition. There is no reason to delay further or to make the Joint Petitioners present their case to the Authority a second time in another docket.

² See *Joint Motion to Move Issues to Generic Proceeding*, Docket No. 04-00046 (filed Apr. 14, 2005). The Panel granted this motion at its May 11, 2005 conference.

³ Joint Petitioners' Opposition at 1-2.

B. The Joint Petitioners Have a Right to a Timely Decision on the TRO-Related Arbitration Issues in This Section 252 Arbitration

Under Section 252, Joint Petitioners have the right to have the *TRO*-Related Arbitration Issues timely resolved in this Section 252 arbitration. Section 252(b)(1) provides Joint Petitioners the right to “petition a State commission to arbitrate *any* open issues ” 47 U.S.C. § 252(b)(1) (emphasis added). The Joint Petitioners as the “petitioners” in this proceeding have the right to raise, and have decided by the Authority in this Section 252 arbitration proceeding, any issues resulting from the negotiations of an interconnection agreement. The Generic Proceeding is not a Section 252 arbitration and, even if it were, it is certainly not the one filed by Joint Petitioners. Joint Petitioners are unwilling to waive their Section 252 arbitration right.

BellSouth’s argument that the Joint Petitioners have availed themselves of this right, “by the filing of the arbitration petition, their participation in the hearing, and the filing of post-hearing briefs” is hollow.⁴ The fact that the Joint Petitioners have fully engaged in this arbitration proceeding does not mean they have exhausted their rights under Section 252 and must agree to move issues out of this arbitration proceeding and into the Generic Proceeding. In no way have the Joint Petitioners waived that right and the *TRO*-Related Arbitration Issues should be decided in this docket where, pursuant to a statutory right, they have been presented, been the subject of an evidentiary hearing, and have been briefed.

BellSouth also makes the hollow argument that it is not requesting the Authority to decide these issues *outside* the Section 252 arbitration, but rather to address these issues “*in conjunction* with the TRA’s consideration of identical or similar issues in the Generic

⁴ BellSouth Reply at 3

Proceeding.”⁵ As the *TRO*-Related Arbitration Issues will have been heard and fully briefed in this docket well before the Authority even has a hearing in the generic docket, BellSouth is essentially asking the Authority to delay considerably, and over the objections of the petitioning parties, resolution of issues to which Joint Petitioners are entitled to prompt resolution in a Section 252 arbitration proceeding.

The Joint Petitioners recognize that the Authority has initiated rulemaking proceedings to address issues involving BellSouth’s Section 251 obligations.⁶ BellSouth provides such examples including the Authority’s performance measurement proceeding, line sharing and UNE ratemaking proceedings.⁷ What BellSouth fails to acknowledge, however, is that these rulemakings are not Section 252 arbitration proceedings. The *TRO*-Related Arbitration Issues that BellSouth seeks to remove from this arbitration are issues that were properly brought before the Authority as a result of contract negotiations between BellSouth and the Joint Petitioners.

Moreover, the fact that these issues may impact other Tennessee CLECs is not justification to disregard the Joint Petitioners’ Section 252 rights to have these issues resolved in this arbitration. BellSouth’s argument that the *TRO*-Related Arbitration Issues are encompassed in the issues list set for the generic docket and that their resolution may affect other carriers is of no import.⁸ Section 252 arbitrations, by their nature, cover issues that may have an impact on carriers other than those participating in the arbitration. This can happen as a result of

⁵ *Id.* at 5.

⁶ *Id.* at 4

⁷ *Id.*

⁸ With respect to issues 36, 37 and 38, BellSouth’s representation that these line conditioning-related issues are encompassed by the existing generic issues list is not a view Joint Petitioners share. *See* BellSouth Reply at 8. **Line Conditioning and Routine Network Modifications are separate rules and separate obligations.** Line Conditioning obligations are not limited to those functions BellSouth voluntarily chooses to perform and thus constitute Routine Network Modifications

subsequent adoption of the arbitrated agreement under Section 252(i) or through application of an arbitration decision as “precedent” affecting the Authority’s decisions in other dockets. The potential that arbitration issues may impact other carriers is not new and is no reason not to decide them after they have been fully and fairly presented. Accordingly, BellSouth’s quote of Joint Petitioner Witness Bo Russell supporting its claim that resolution of the EEL Audit issue (Issue 51) will impact other carriers is also of no import.⁹ The potential that arbitration issues may impact other carriers is not new and is no reason not to decide them after they have been fully and fairly presented.

Precedent on the issue of whether decision on a Section 252 arbitration issue can be deferred or delayed over the objections of a party petitioning for arbitration is mixed. As BellSouth has indicated, the Florida Commission rejected BellSouth’s Motion in the companion arbitration being held before that commission.¹⁰ The South Carolina Commission granted BellSouth’s Motion (and in so doing, unjustly refused to allow Joint Petitioners an opportunity to object or respond to it).¹¹ An arbitration panel acting on authority delegated by the Mississippi Commission also granted BellSouth’s Motion and signed the proposed order presented by BellSouth.¹² Commissions in Alabama, Kentucky and Louisiana have yet to rule on BellSouth’s Motion.

⁹ BellSouth Reply at 9

¹⁰ *Id.* at 6. See also Order Granting in Part and Denying in Part BellSouth Telecommunications, Inc.’s Motion to Move Issues Into Docket No. 041269-TP, Docket No. 04013-TP (Apr. 26, 2005). As indicated in Joint Petitioners’ Opposition to BellSouth’s request in Florida, the Florida Public Service Commission has established precedent wherein it has refused requests to remove issues involuntarily from section 252 arbitrations.

¹¹ No order has been issued by the South Carolina Commission to date.

¹² Joint Petition for Arbitration of NewSouth Communications, Corp., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jackson, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Order Granting BellSouth Telecommunications, Inc.’s Motion

BellSouth incorrectly relies on decisions of the Georgia Commission and the North Carolina Commission to support its argument that arbitration issues, which affect more than one CLEC, should be withdrawn from a Section 252 arbitration and resolved in a Generic Proceeding.¹³ In its Motion, BellSouth cites to a Georgia Commission decision in which the Georgia Commission, *sua sponte*, moved issues from a Section 252 arbitration into a generic proceeding.¹⁴ It does not appear that any party to the arbitration objected to the deferral of a decision on the issues. Thus, the Georgia Commission apparently did not decide to move issues (and thus delay decision) at the request of one party over the opposition and objections of another.¹⁵

Although several years ago the North Carolina Commission decided to move certain issues in the BellSouth/AllTel arbitration, that were already under consideration in the generic dockets out of the parties' arbitration proceeding,¹⁶ that Commission more recently denied BellSouth's request to remove issues from a Section 252 arbitration.¹⁷ In the recent ITC^DeltaCom/BellSouth arbitrations in North Carolina and here in Tennessee, BellSouth attempted to remove arbitration issues it claimed were better addressed in other forums. The

to Move TRO Arbitration Issues to Generic Proceeding (Docket No. 2005-AD-139), Docket No. 2004-AD-094 (June 14, 2005)

¹³ BellSouth Reply at 6-7

¹⁴ *See id.* at 7

¹⁵ *See* Petition of MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket No. 11901-U, Order at 11 and 14 (Feb. 6, 2001)

¹⁶ In the Matter of Petition of ALLTEL Communications, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 with BellSouth Telecommunications, Inc., Order Transferring Issues, Docket No. P-514, Sub 18 (Apr. 9, 2001)

¹⁷ In the Matter of Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Order Denying BellSouth Motion to Remove Issues, NCUC Docket No. P-500, Sub 18 at 3 (July 11, 2003) ("NCUC DeltaCom Order")

North Carolina Utilities Commission and the Authority **rejected** BellSouth's motions.¹⁸ Thus, BellSouth is simply wrong when it argues that the Joint Petitioners have not cited any Authority precedent that "undermines BellSouth's arguments."¹⁹

The Joint Petitioners' have fully complied with Section 252 of Telecommunications Act in all aspects of this arbitration, including negotiation of an interconnection agreement, filing of an arbitration proceeding and participating in the phases of the arbitration proceeding. The Joint Petitioners simply request that the Authority sustain and enforce the provisions of Section 252 and not allow BellSouth to manipulate the course of this proceeding by selecting what arbitration issues remain in this proceeding and what issues are removed to the Generic Proceeding.

C. Grant of BellSouth's Request Would Be Highly and Unduly Prejudicial to the Joint Petitioners

Finally, and as discussed in the Joint Petitioners' Opposition,²⁰ BellSouth is simply wrong in drawing the conclusion that the Joint Petitioners would not be prejudiced by transferring these issues to the Generic Proceeding or delaying their resolution.²¹ As indicated above, Joint Petitioners already have presented their case on these issues and should not be forced to present their case again. Moreover, as set forth in the Joint Petitioners' brief in this

¹⁸ See Petition for Arbitration of ITC^DeltaCom Communications, Inc With BellSouth Telecommunications, Inc , Initial Order Regarding BellSouth's Motion to Remove Issues and Other Pre-Hearing Procedural Issues, TRA Docket No. 03-00119 (Aug 20, 2003). The Tennessee Authority similarly rebuffed efforts by BellSouth to remove issues from an earlier section 252 arbitration involving ICG See Petition by ICG Telecom Group, Inc., TRA Docket 99-00377, Final Arbitration Order at 9 (Aug 4, 2000) See also NCUC DeltaCom Order at 3 Additionally, the Kentucky Public Service Commission has specifically stated that the Communications Act of 1934, as amended requires "that a state commission is to resolve 'each issue' in a petition for arbitration of an interconnection agreement " see In the Matter of Petition by MCI, et al for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order, Case Nos. 96-431, 96-482 (Aug 27, 1997)

¹⁹ BellSouth Reply at 8

²⁰ Joint Petitioners' Opposition at 5.

²¹ BellSouth Reply at 10-11

proceeding, BellSouth has not proven that it should prevail on any of the *TRO*-Related Arbitration Issues (or any others). BellSouth should not be given a second chance (with respect to the Joint Petitioners) to do what it proved it could not do in the context of this arbitration: prove its case on the issues.

Even more importantly, BellSouth should not be permitted to delay compliance with the FCC's *TRO* mandates which have now been law since October 2003. Issues 26 and 51 encompass commingling and EELs, which are critical tools for facilities-based carriers such as Joint Petitioners to avail themselves fully of their rights to certain UNEs that BellSouth is required to unbundle even under the new rules. BellSouth's attempt to further delay compliance must be rejected.²²

²² On page 10 of its Reply, BellSouth notes in its defense that the Joint Petitioners' current interconnection agreements have not been amended to reflect the *TRO*, even for those rights that were not impacted by subsequent FCC or court decisions. Not surprisingly, **BellSouth fails to disclose why this is the case.** It is because BellSouth **refused** to amend the interconnection agreement to incorporate **any** aspect of the *TRO*, unless the Joint Petitioners accepted BellSouth's view on all aspects of the *TRO*. This would have required Joint Petitioners to give up the right to use UNEs as wholesale service inputs and would have required them to accept a version of the FCC's EEL eligibility criteria that was intentionally amended by BellSouth to depart from the requirements of the rule. Yes, that is right. **Joint Petitioners were forced to file for arbitration on the FCC's EEL eligibility criteria because BellSouth insisted on changing words in the rule so that it could further curtail Joint Petitioners' rights to use EELs.** These issues have since been resolved – Joint Petitioners will retain the right to use UNEs for wholesale services and will no longer be forced to further arbitrate the EELs eligibility criteria (the issue of EEL audits remains in dispute). Other issues have not been resolved. This allows BellSouth to use the arbitration process to delay the day it must comply with the *TRO* rule changes that favor CLECs, such as EELs eligibility criteria and commingling

WHEREFORE, for the foregoing reasons, Joint Petitioners request that the Authority reject BellSouth's request to move *TRO*-Related Arbitration Issues to the Generic Proceeding and find that the *TRO*-Related Arbitration Issues should be decided in this arbitration proceeding.

Respectfully submitted this 18th day of July, 2005.



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Counsel to Joint Petitioners

July 18, 2005

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via U. S. Mail, first class postage prepaid, to the following, this the 18th day of July, 2005.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201



H. LaDon Baltimore